STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT APPEALS
(JESSICA R. COOPER, P.J., E. THOMAS FITZGERALD and KIRSTEN FRANK KELLY, J.J.)
AND THE WORKER'S COMPENSATION APPELLATE COMMISSION

SCOTT M. CAIN,

Plaintiff-Appellee,

v

WASTE MANAGEMENT, INC. and
TRANSPORTATION INSURANCE COMPANY,

Defendants-Appellees,

and
SECOND INJURY FUND (TOTAL AND PERMANENT
DISABILITY PROVISIONS),

Defendant-Appellant.
_____/

Supreme Court No.: 125180
(consolidated with 125111)

Court of Appeals No.: 242123
(consolidated with 242104)

Lower Court No.: WCAC 98-000390

BRIEF ON APPEAL OF DEFENDANT-APPELLANT SECOND INJURY FUND (TOTAL AND PERMANENT DISABILITY PROVISIONS)

ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

The underlying facts in this case have already been recited by this Court in its previous opinion in *Cain v Waste Management, Inc*, 465 Mich 509; 638 NW2d 98 (2002). Those underlying facts have neither been added to nor subtracted from since that submission. The underlying facts as stated by the Court are:

> Plaintiff Scott M. Cain worked as a truck driver and trash collector for defendant, Waste Management, Inc. In October 1988, as he was standing behind his vehicle emptying a rubbish container, he was struck by an automobile that crashed into the back of the truck. Mr. Cain's legs were crushed. Physicians amputated Mr. Cain's right leg above the knee. His left leg was saved with extensive surgery and bracing.
>
> In February 1990, Mr. Cain was fitted with a right leg prosthesis, and he was able to begin walking. He returned to his employment at Waste Management and started performing clerical duties.
>
> Mr. Cain's left leg continued to deteriorate. In October 1990, he suffered a distal tibia fracture. Doctors diagnosed it as a stress fracture caused by preexisting weakness from the injury sustained in the accident. After extensive physical therapy and further surgery on his left knee, Mr. Cain was able to return to Waste Management in August 1991, first working as a dispatcher and then in the sales department.
>
> Waste Management voluntarily paid Mr. Cain 215 weeks of worker's compensation benefits for the specific loss of his right leg. MCL 418.361(2)(k). However, there was disagreement concerning whether he was entitled to additional benefits. *Cain*, 465 Mich at 513.

The Court had also recounted a procedural history of the case, summarized here as follows.

Plaintiff filed a petition with the Bureau of Worker's Disability Compensation seeking total and permanent disability benefits for "'the industrial loss of use of both legs'" under MCL 418.361(3)(g). *Cain*, 465 Mich at 514. At the hearing, plaintiff moved to amend his petition to

include a claim for specific loss of his non-amputated left leg under MCL 418.361(2)(k).[1] The trial Magistrate denied the motion. *Id.* Plaintiff then filed an amended pleading requesting benefits for the specific loss of the left leg. *Id.*

Following trial, the Magistrate awarded plaintiff specific loss benefits for each of his legs. *Id.* The Magistrate reasoned that, although he had denied plaintiff's amendment to add a claim for specific loss of the left leg, plaintiff's original claim for "loss of the industrial use of both legs implicitly included a claim for the specific loss of the left leg." *Id.*

After finding the specific loss of both legs, the Magistrate also found plaintiff had "lost the industrial use of both legs" under MCL 418.361(3)(g) and, therefore, the "Fund would be obligated to pay benefits for total and permanent disability." *Cain*, 465 Mich at 515; Defendant-Waste Management's Appendix 11a.[2]

The Second Injury Fund (Total and Permanent Disability Provisions) [hereinafter the Fund] and defendant-employer Waste Management, Inc. and Transportation Insurance Company [hereinafter defendant-employer] appealed the Magistrate's decision to the Worker's Compensation Appellate Commission. The Commission held the Magistrate erred in awarding benefits for the specific loss of the left leg, given the limited allegations of plaintiff in his petition. The Commission also held the Magistrate legally erred in his analysis of plaintiff's total and permanent disability claim. On this point, the Commission said the determination of whether plaintiff was totally and permanently disabled necessitates use of a "'corrected'" standard in evaluating the industrial usefulness of plaintiff's "*braced* leg", *i.e.*, evaluate use of the left leg *with* the corrective aid of the brace. *Cain*, 465 Mich at 515 (emphasis in original).

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[1] These different types of disability claims are explained in the Arguments that follow.
[2] The "total and permanent disability" classification entitles claimants to an additional layer of weekly benefits as also explained in the Arguments that follow.

Plaintiff appealed the Commission's decision to the Court of Appeals and leave was granted. In an unpublished opinion issued May 2, 2000 in CA docket no. 214445, the Court affirmed in part, reversed in part, vacated in part, and remanded for further proceedings. (Defendant-Waste Management's Appendix 38a-40a).[3]

First, the Court of Appeals affirmed the Commission's denial of specific loss benefits for the left leg on the basis plaintiff had not sufficiently pled such benefits. *Cain*, 465 Mich at 515.

Second, the Court of Appeals reversed on the total and permanent disability question. *Cain*, 465 Mich at 515-516. The Court reasoned an "uncorrected" test is the proper criteria for resolving the total and permanent question. *Cain*, 465 Mich at 516. That is, the question to be answered is: did plaintiff lose the industrial use of his legs *without* taking into account corrective devices? *Id.* The Court of Appeals remanded with instructions the Commission apply such "uncorrected" test and make the requisite factual determination.

Not awaiting the remand, the Fund and defendant-employer applied to this Court for leave to appeal, which was granted and produced the Court's opinion referred to above. This Court reversed in part the Court of Appeals' judgment. (Defendant-Waste Management's Appendix 41a-61a). Specifically, this Court adopted the Commission's view of total and permanent disability, *i.e.*, a corrected test is to be used to determine the total and permanent disability question under § 361(3)(g). *Cain*, 465 Mich at 521-524. This Court in a footnote added with respect to plaintiff's specific loss of the left leg claim that: "[w]hile this claim may not have been pleaded as specifically as it should have been, we discern no prejudice or surprise. Accordingly, we remand this claim to

[3] Numbers in parentheses refer to the pages of Defendants-Appellants', Waste Management, Inc. and Transportation Insurance Company's Appendix or Defendant-Appellant's, Second Injury Fund's Appendix, as designated.

the WCAC for resolution." *Cain*, 465 Mich at 510 n 1.[4] This Court concluded its opinion saying: "We remand to the WCAC to consider plaintiff's specific loss claim." *Cain*, 465 Mich at 524.

On remand, the Commission found under the uncorrected test plaintiff had sustained the specific loss of his left leg. The Commission added as the last sentence of its opinion: "Having shown specific loss of each leg, plaintiff is entitled to total and permanent disability benefits." (Defendant-Waste Management's Appendix 33a).

The Fund applied to the Court of Appeals for leave to appeal. Defendant-employer did as well.

In an order entered September 6, 2002, the Court of Appeals granted both applications and consolidated the cases. (Fund's Appendix 1a).

In a published decision entered November 6, 2003, the Court of Appeals affirmed the Commission's award of total and permanent disability benefits in a 2-1 ruling. (Defendant-Waste Management's Appendix 63a-72a).

The Fund applied to this Court for leave to appeal (SC Docket No. 125180). The defendant-employer did as well (SC Docket No. 125111). The Court granted both applications and ordered the cases be argued and submitted together. In the order granting the Fund's application, the Court directed the parties to include among the issues briefed the following: whether the Worker's Compensation Appellate Commission exceeded the scope of this Court's remand order by awarding plaintiff total and permanent disability benefits; whether the "loss of industrial use" standard may be applied to claims of specific loss under MCL 418.361(2); whether *Pipe v Leese Tool & Die Co*, 410 Mich 510 (1981), should be overruled; and, whether total and permanent disability benefits under

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[4] There were additional issues upon which leave was granted as well, but this Court "vacate[d] [the] order granting leave to appeal regarding all other issues." *Cain*, 465 Mich at 510-511 n 1. Those issues are irrelevant to the appeals.

MCL 418.361(3)(b) [loss of both legs] may be awarded on the basis of plaintiff's specific (anatomical) loss of one leg and his specific (industrial use) loss of the other leg. (Fund's Appendix 8a). In granting defendant-employer's application, the Court directed among the issues to be briefed two of the same issues identified in the Fund's application, namely: whether the "loss of industrial use" standard may be applied to claims of specific loss under § 361(2) and whether *Pipe* should be overruled. *Id.* at 9a.

What follows are the Fund's arguments requesting reversal of the Court of Appeals' decision.

SUMMARY OF ARGUMENTS

The Fund answers the specific questions posed by the Court in its order granting leave as follows:

- The Worker's Compensation Appellate Commission exceeded the scope of the Court's remand order in awarding plaintiff total and permanent disability benefits.
- The "loss of industrial use" standard should not apply to claims of specific loss under MCL 418.361(2).
- The Court should overrule *Pipe v Leese Tool & Die Co*, 410 Mich 510; 302 NW2d 526 (1981).
- Total and permanent disability benefits under MCL 418.361(3)(b) [loss of both legs] cannot be awarded on the basis of a specific (anatomical) loss of one leg and a specific (industrial use) loss of the other leg.

The first Argument that follows addresses the issue of whether the Commission exceeded the Court's remand order. The second Argument addresses whether total and permanent disability benefits under § 361(3)(b) can be awarded for the anatomical loss of one leg and the loss of industrial use of the other. The third Argument addresses plaintiff's claim of the specific loss under § 361(2) via a loss of industrial use standard and whether the Court should overrule *Pipe v Leese Tool & Die Co*, 410 Mich 510; 302 NW2d 526 (1981).

ARGUMENT

I. THIS CASE HAD BEEN REMANDED BY THE COURT WITHOUT ANY INTIMATION PLAINTIFF HAD A REMAINING ACTIONABLE TOTAL AND PERMANENT DISABILITY CLAIM. THEREFORE, THE WORKER'S COMPENSATION APPELLATE COMMISSION LEGALLY ERRED BY EXCEEDING THE SCOPE OF THIS COURT'S REMAND ORDER AND AWARDING PLAINTIFF TOTAL AND PERMANENT DISABILITY BENEFITS.

A. Standard Of Review

The Court reviews decisions of the Worker's Compensation Appellate Commission to determine whether the Commission has erred as a matter of law and to determine whether the factfinding below has the support of competent evidence in the record. Const 1963, art 6, § 28; MCL 418.861a(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). The Court reviews legal issues *de novo*. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401; 605 NW2d 300 (2000).

B. Preservation Of Issues

All issues raised in this brief were preserved at the trial level or the issues were created by the Commission's opinions.

C. Procedural Error Below

To appreciate how the Commission procedurally erred and exceeded this Court's remand order, it is worthwhile to review the different disability categories in the Worker's Disability Compensation Act.

The most common type of disability in the Act is general disability defined in MCL 418.301(4). The general disability provision is not at issue here.[5] Besides general disability, the

[5] The Court may wonder why the general disability provision is not at issue. The reason is plaintiff has worked after his injury. That reality excludes him in all likelihood from general disability benefits under § 301(4) because § 301(4) is an inquiry into wage earning capacity. But, plaintiff's ability to earn wages does not exclude him from specific loss benefits or total and

Act also provides weekly compensation for other disabilities, referred to as "schedule[d]" disabilities in MCL 418.361(2) and (3). One type of scheduled benefit is "specific loss" benefits in MCL 418.361(2). A person who loses an eye, a finger, a hand, or a leg, for example, is entitled to weekly benefits for the specific number of weeks recited in § 361(2).[6]

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permanent disability benefits under § 361(2) and (3), respectively, because such benefits are primarily intended to compensate for non-vocational loss. *E.g.*, *Redfern v Sparks-Withington Co*, 403 Mich 63, 80; 268 NW2d 28 (1978). Thus, there is no offset for wages earned post-injury if one is found to have a specific loss or total and permanent disability.

[6] The present specific loss provision reads in full: "In cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:

(a) Thumb, 65 weeks.

(b) First finger, 38 weeks.

(c) Second finger, 33 weeks.

(d) Third finger, 22 weeks.

(e) Fourth finger, 16 weeks.

The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of ½ of that thumb or finger, and compensation shall be ½ of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire finger or thumb. The amount received for more than 1 finger shall not exceed the amount provided in this schedule for the loss of a hand.

(f) Great toe, 33 weeks.

(g) A toe other than the great toe, 11 weeks.

The loss of the first phalange of any toe shall be considered to be equal to the loss of ½ of that toe, and compensation shall be ½ of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire toe.

(h) Hand, 215 weeks.

(i) Arm, 269 weeks.

An amputation between the elbow and wrist that is 6 or more inches below the elbow shall be considered a hand, and an amputation above that point shall be considered an arm.

(j) Foot, 162 weeks.

(k) Leg, 215 weeks.

An amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg.

(*l*) Eye, 162 weeks.

Eighty percent loss of vision of 1 eye shall constitute the total loss of that eye." MCL 418.361(2).

Listed in a separate provision of § 361, the other type of scheduled benefit is "total and permanent" disability benefits in MCL 418.361(3). These scheduled benefits "are distinct from the scheduled specific loss benefits." *Cain*, 465 Mich at 512. Total and permanent disability benefits are benefits for the more catastrophic types of work injuries where the employee loses more than one body member, *e.g.*, loses both legs, both hands, both eyes, *etc.*[7] Persons found totally and permanently disabled receive an additional layer of weekly benefits, called "differential benefits," above and beyond the benefits afforded those in the specific loss or general disability category. MCL 418.521(2). Such differential benefits are paid by the Fund, the instant defendant. It is plaintiff's claim of total and permanent disability benefits that involved the Fund in this litigation.

The Court in its prior decision in this case drew a bright line between specific losses and total and permanent disability [T&P] benefits. The Court said, "we have remained cognizant of the distinction between specific loss benefits and total and permanent disability benefits." *Cain*, 465 Mich at 521. Quoting and adopting as its own the Commission's initial analysis of the statutory difference between the benefits, the Court said: "'the appellate courts throughout the long interpretational history of the two statutory provisions continue[] to provide an important divider between the specific loss entitlements and the total and permanent disability entitlements established under the statute.'" *Cain*, 465 Mich at 521-522. The Court emphasized the "'substantial

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[7] The total and permanent disability provision presently reads in full: "Total and permanent disability, compensation for which is provided in section 351 means:

(a) Total and permanent loss of sight of both eyes.
(b) Loss of both legs or both feet at or above the ankle.
(c) Loss of both arms or both hands at or above the wrist.
(d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c).
(e) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.
(f) Incurable insanity or imbecility.
(g) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury." MCL 418.361(3).

differences'" between specific loss benefits and T&P benefits resulting in the two being "'separately identified in their own subsections.'" *Cain*, 465 Mich at 524.[8]

Therefore, in a word, specific loss benefits and T&P benefits are distinctly different categories of benefits divided by the statute itself, as the Court has already recognized.

Well aware of this distinction, the Court remanded this case to the Commission to only consider whether plaintiff is entitled to benefits for the specific loss of his left leg under § 361(2)(k). The Court said "the WCAC should have considered plaintiff's specific loss claim regarding the left leg. ... Accordingly, we remand *this* claim to the WCAC for resolution." *Cain*, 465 Mich at 510 n 1 (emphasis added). The Court at the conclusion of its prior opinion reiterated: "We remand to the WCAC *to consider plaintiff's specific loss claim.*" *Cain*, 465 Mich at 524 (emphasis added). There was no directive from the Court to decide whether plaintiff is entitled to T&P benefits , *i.e.*, the type of disability "distinct from the scheduled specific loss benefits." *Cain*, 465 Mich at 512. Nor was there any intimation by the Court there remained any actionable basis for T&P benefits, given the Court's previous ruling that plaintiff did not qualify for T&P benefits under the loss of industrial use of the legs provision, § 361(3)(g).

The Commission elected, nevertheless, to go beyond resolving the specific loss question to add "plaintiff is entitled to total and permanent disability benefits." (33a). This was an error of law because:

> ... the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. *Sokel v Nickoli*, 356 Mich 460, 465; 97 NW2d 1 (1959). *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

[8] The original workers' compensation statute had listed both types of scheduled benefits in one section with the T&P type listed last. (Fund's Appendix 10a-11a).

If the Court had wanted the Commission to consider T&P benefits under § 361(3) in addition to a specific loss under § 361(2), then the Court could have said:

> We remand to the WCAC to consider plaintiff's specific loss claim *and whether plaintiff is totally and permanently disabled. Cain*, 465 Mich at 524 (emphasized words added).

The Court did not so order. The Commission, therefore, procedurally erred by deciding more than the specific loss claim. As will be seen, there in fact was no legally cognizable T&P claim remaining to be adjudicated.

D. Court of Appeals' Resolution Of The Procedural Question

The Court of Appeals disagreed with the Fund on this procedural question saying it was the "next logical conclusion" for the Commission to consider T&P benefits, given plaintiff had now been awarded specific loss benefits under § 361(2) for each of his legs. (Defendant-Waste Management's Appendix 69a).

The Court of Appeals said:

> Initially, SIF claims that the WCAC's award of total and permanent disability benefits exceeded the scope of the Supreme Court's remand and that such benefits were unavailable absent a specific request from plaintiff. We find no merit to these arguments. The Supreme Court's remand instructions did not preclude the WCAC from considering whether plaintiff was entitled to total and permanent disability benefits under another section of MCL 418.361(3).[31] Rather, the Supreme Court simply instructed the WCAC to consider whether plaintiff suffered the specific loss of his left leg. There were no restrictions placed on the WCAC from making the next logical conclusion if it found that plaintiff had lost the specific use of both his legs.
>
> [31] See, e.g., *Modreski v General Motors Corp*, 417 Mich 323, 333-334; 337 NW2d 231 (1983). (Defendant-Waste Management's Appendix at 68a-69a).

The Fund respectfully submits the Court of Appeals is wrong. Simply because an issue is not explicitly excluded from consideration on remand cannot mean it is fair game to be decided.

Many issues were not specifically precluded by this Court from being considered on remand. That did not mean they all remained adjudicable. If the Court of Appeals' view is correct, then the Court must not only direct what is to be decided on remand but also explicitly recite what is not to be decided.

The Commission's stretch beyond the explicit remand directive is particularly harmful here because a T&P claim based upon § 361(3)(b), the unarticulated basis of the Commission's T&P finding on remand (see, Defendant-Waste Management's Appendix 68a-69a and 71a), had not been explicitly pled by plaintiff. The Court of Appeals dismissed this concern saying "plaintiff made a general request for total and permanent disability benefits" and the Court could "discern no surprise to SIF on remand." (Defendant-Waste Management's Appendix 69a). But the Fund was surprised and for good reason. There are seven different grounds possible for obtaining T&P benefits listed in MCL 418.361(3). A claimant must at least specify which of these categories is the basis for his or her T&P claim so defendants know what to defend. Defendants cannot be left to guess under which categories plaintiff plans to proceed. Additionally, discovery in workers' compensation is much more limited than in the civil courts. Consequently, no discovery of plaintiff's T&P basis occurred. The Fund defended the T&P basis articulated in plaintiff's petition, the loss of industrial use category of T&P under § 361(3)(g). If the Fund had known the Commission would consider on remand T&P under the unpled § 361(3)(b) [loss of both legs at or above the ankle], then the Fund could have told the Commission what the Fund says in the Argument that follows, namely: there can be no award for T&P under § 361(3)(b) because that category of T&P is reserved for amputated limbs not for loss of industrial use of one or more limbs.

E. ***Modreski***

The Court of Appeals relied upon *Modreski v General Motors Corp*, 417 Mich 323; 337 NW2d 231 (1983) for its expansive view of remands. The Fund contends *Modreski* makes the Fund's point and not the Court of Appeals' point.

In *Modreski*, plaintiff "petitioned for total and permanent disability benefits, alleging *both* incurable insanity and the loss of industrial use of a right arm and right leg," *i.e.*, plaintiff alleged two different bases for T&P. *Modreski*, 417 Mich at 325-236 (emphasis added). At trial, the hearing examiner (precursors of today's trial Magistrates) granted Ms. Modreski benefits for "incurable insanity" and, as a result doing so, never reached her alternative basis for T&P, *i.e.*, loss of industrial use of limbs.[9] While the case was on appeal, case law changed the legal inquiry for insanity claims. That case law change led this Court to remand *Modreski* for application of the newly created rule. On remand, plaintiff did not prevail under the new rule and this Court affirmed that result. But, this Court remanded correctly noting Ms. Modreski had pled a second basis for T&P (loss of limbs) and that claim had never been adjudicated because she had originally prevailed on the other T&P basis. *Modreski* explained:

> Likewise, in its first opinion in this matter, the WCAB did not address the issue, instead affirming the hearing referee *in toto*. Further, this Court's remand order for reconsideration in light of *Redfern* did not limit the claims which could be addressed, *i.e.*, if plaintiff was found not to be incurably insane, consideration of her claim of loss of industrial use was not precluded. In other words, her claim of loss of industrial use was not outside the scope of the remand order. [Cases omitted]. Indeed, since the WCAB reversed its first decision, thereby denying plaintiff benefits, fairness dictates that it then should have addressed her other claim which had not previously been considered. *Modreski*, 417 Mich at 333-334.

[9] There would be no advantage to plaintiff in terms of weekly benefits to have two T&P awards running concurrently and both beginning as of one injury date.

Modreski therefore addressed a T&P claim specifically pled yet not reached because the claimant had prevailed on her alternative T&P claim. Here, plaintiff never pled T&P on a § 361(3)(b) basis. This Court remanded only for resolution of a questionably pled claim of specific loss under § 361(2). The Commission went beyond deciding that question and – *unlike Modreski* – resolved a T&P claim never pled.

The remainder of the Court of Appeals' reasoning is also faulty. The Court said the Commission's one sentence resolution of the unpled T&P claim was simply "the next logical conclusion" following from the Commission's finding of a specific loss of the non-amputated leg coupled with the amputation of plaintiff's other leg. (Defendant-Waste Management's Appendix 68a-69a). Where one suffers an amputation of one leg and there is a finding of a specific loss of an unamputated leg on a loss of industrial use basis, it does *not* necessarily follow the claimant has proven T&P for reasons the Fund explains in its next Argument.

II. TOTAL AND PERMANENT DISABILITY BENEFITS FOR LOSS OF BOTH LEGS ARE ONLY PAYABLE IN THREE CIRCUMSTANCES, NONE OF WHICH APPLY HERE. SPECIFICALLY, PLAINTIFF HAS NOT LOST BOTH LEGS "AT OR ABOVE THE ANKLE", DOES NOT HAVE "PERMANENT AND COMPLETE PARALYSIS OF BOTH LEGS," AND THE COURT HAS ALREADY DETERMINED PLAINTIFF HAS NOT "LOS[T] [THE] INDUSTRIAL USE OF BOTH LEGS."

A. Standard Of Review

The standard of review with respect to this issue is the same as that for the preceding issue.

B. Section 361(3)(b) Only Contemplates Awarding T&P For Amputations "At Or Above The Ankle" And Plaintiff's Left Leg Has Not Been Amputated At All

"Ultimately, entitlement to worker's compensation benefits must be determined by reference to the statutory language creating those benefits. [Citation omitted].", said the Court in *Cain*, 465 Mich at 519; see also, *Kidd v General Motors Corp*, 414 Mich 583, 584; 327 NW2d 265 (1982). Here, there is no "statutory language creating" T&P benefits for plaintiff's condition. *Id.* Therefore, T&P benefits should not have been awarded.

The three T&P provisions that specifically address the legs are: § 361(3)(e), (g), and (b). Subsection 361(3)(e) grants T&P benefits if there is "[p]ermanent and complete paralysis of both legs." Plaintiff makes no claim, in any manner, that he seeks T&P benefits under this category. It is not at issue. Subsection 361(3)(g) grants T&P benefits for "loss of industrial use of both legs." The Court has already held plaintiff does not satisfy this provision. It is no longer at issue.

The remaining category is subsection 361(3)(b), which is the basis for the T&P award here. (Defendant-Waste Management's Appendix 68a-69a and 71a). This subcategory of T&P is textually confined to the loss of both legs or both feet where both legs or both feet have been amputated. See, *Paulson v Muskegon Heights Title Co*, 371 Mich 312, 319; 123 NW2d 715 (1963). That is why the category specifies how much amputation must occur: "Loss of both legs or both

feet *at or above the ankle.*" MCL 418.361(3)(b) (emphasis added).[10] A person either does or does not have an amputation "at or above the ankle." Here, plaintiff has no loss at or above the left ankle. There is in fact no amputation at all of plaintiff's left extremity.

The different language used throughout the T&P provision as a whole confirms that § 361(3)(b) is confined to double amputees. The T&P statute is worth recounting here with appropriate emphasis to demonstrate this point:

> Total and permanent disability, compensation for which is provided in section 351 means:
>
> (a) *Total* and *permanent* loss of sight of both eyes.
> (b) Loss of both legs or both feet at or above the ankle.
> (c) Loss of both arms or both hands at or above the wrist.
> (d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c).
> (e) *Permanent* and *complete* paralysis of both legs or both arms or of 1 leg and 1 arm.
> (f) *Incurable* insanity or imbecility.
> (g) *Permanent* and *total* loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury. MCL 418.361(3) (emphasis added).

Note how the Legislature uses the words "permanent," "total," and/or "incurable" to designate those categories of T&P where amputation is not required. By contrast, there was no need for the Legislature to say, for example, anatomical loss of both legs above the ankle must be "permanent," "total," or "incurable" because amputated limbs do not regenerate. But where there is loss of sight (but not actual loss of both eyes) the Legislature requires "total and permanent" loss of sight. Where there is paralysis (rather than amputation), the Legislature requires "[p]ermanent and complete paralysis" of such non-amputated limbs. Mental claims naturally involve no amputation.

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[10] In the parallel provision relating to the upper extremities, the Legislature similarly specifies a measurable loss "at or above the wrist." MCL 418.361(3)(c).

Thus, the Legislature requires "incurable" mental problems. And, as this Court knows from the last submission, the Legislature requires the "[p]ermanent and total" loss of industrial use of two limbs in that non-amputation category of § 361(3)(g).

Simply put, non-amputation categories of T&P – *because* they are non-amputation categories – necessitated different language to specify the gravity of the loss to a status sufficiently comparable – in the Legislature's judgment – to the loss experienced by amputees. By contrast, T&P for loss of a leg contains no such language and, instead, requires amputation "at or above the ankle" which is not present here with respect to plaintiff's left leg.

C. Court Of Appeals' Treatment Of This Issue

The Court of Appeals' majority failed to recognize these distinctions. The Court analyzed this issue by invoking discredited rules of statutory construction to ignore differences in statuory language. The Court of Appeals said construction of statutes that produce "'absurd result[s]'" should be avoided. A statute is to be applied as it reads, "'absurd result'" or not. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 766; 641 NW2d 567 (2002); *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999). However, the Fund hastens to add, applying this statute as it reads leads to no absurd result. By contrast, ignoring the statute's text has led to the following "'absurd result'": this Court has already held at the last submission plaintiff is not totally and permanently disabled because he has not lost the industrial use of his left leg, yet plaintiff has now been granted T&P benefits for the loss of industrial use of that leg (plus his amputated right leg). [Compare, *Cain*, 465 Mich at 515 and Commission's second decision at Defendant-Waste Management's Appendix 28a-33a.]

The Court of Appeals' majority's analysis of this issue included the remark that workers' compensation statutes "must be liberally construed" because of their remedial nature, citing

amongst other cases *Hagerman v Gencorp Automotive*, 457 Mich 720, 739; 579 NW2d 347 (1998). (Defendant-Waste Management's Appendix 71a). This Court recently remarked that entry level entitlement requirements within the Worker's Disability Compensation Act, of which the T&P category is one, are not subject to liberal construction. *Rakestraw v General Dynamics Land Systems*, 469 Mich 220, 233; 666 NW2d 199 (2003). Moreover, courts are to avoid such "dice-loading" approaches to construing statutes. Statutes apply as plainly written, not as influenced at the outset by consistent rules that predestine the results. See, *Crowe v Detroit*, 465 Mich 1, 13; 631 NW2d 293 (2001); see also, Chief Justice Corrigan's concurrence in *Maier v General Telephone Co*, 466 Mich 879; 645 NW2d 654 (2002).

Laying aside the Court of Appeals' rules of statutory construction, the majority's substantive reasoning was that this Court in its previous decision only addressed § 361(3)(g) and did not preclude recovery under § 361(3)(b). This Court last discussed § 361(3)(g) because that was the only category of T&P at issue. This Court did not address § 361(3)(b) or any other T&P category because such claims were not at issue. And they were not at issue for obvious reasons – plaintiff's two legs have not both been amputated nor are they paralyzed and, therefore, no inquiry under § 361(3)(b) or (e) was possible. Furthermore, this Court's prior descripton of the overall T&P category did imply recognition of the "amputation"/"anatomical loss" requirement in § 361(3)(b). For example, the Court contrasted § 361(3)(b) with § 361(3)(g)'s loss of industrial use provision by saying:

> This [§ 361(3)(g)] category allows recovery for total and permanent disability where there is no anatomical loss, but where there is loss of industrial use. Hence, for example, even if an employee does not suffer an actual amputation of one or both legs so as to qualify the specific loss benefit, he may nevertheless be entitled to scheduled benefits for injury to both legs if he has lost the "industrial use" of his legs. In this way the "loss of industrial use" category of total and

> permanent benefits differs from other total and permanent categories. *Cain*, 465 Mich at 512.[11]

Note as well how the Court of Appeals' decision, in effect, contravenes this Court's prior decision. This Court determined plaintiff did not satisfy the loss of industrial use requirement with respect to his non-amputated leg. *Cain*, 465 Mich at 515. But, it has now been determined on remand he has lost the industrial use of that leg. (Defendant-Waste Management's Appendix 68a-72a). Recall that there is a link between, on the one hand, specific losses and the uncorrected test [*i.e.*, evaluation without reference to corrective aids] and, on the other hand, T&P and the corrected test [evaluation taking into account corrective aids]. This Court previously held that for T&P the corrected test applies. The decisions below have now, in effect, re-injected an uncorrected test to determine T&P.

The Court of Appeals partial dissent recognized this. Judge Kelly said the only relevant T&P category in this case was § 361(3)(g)'s loss of industrial use category because it is the one allowing for T&P recovery "where there is no anatomical loss." (Fund's Appendix 5a).

The partial dissent also recognizes that the word "loss" in § 361(3)(b) refers to amputated loss:

> When read in conjunction with subsection (g) of MCL 418.361(3), it becomes clear that "[l]oss" in subsection (b) does not refer to *industrial* "loss of both legs." The Legislature expressly included "loss of industrial use of both legs" in subsection (g). Therefore, "[l]oss of both legs" in subsection (b) excludes the category of "loss of industrial use of both legs." Under principles of statutory construction, this Court is required to give effect to every statutory clause and to consider the statutory context holistically. *Eversman v Concrete Cutting & Breaking*, 463 Mich 86, 99; 614 NW2d 862 (2000).

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[11] Quoting the Commission's description of presently controlling case law, this Court in *Cain* did say at another point specific loss benefits are for "'anatomical loss or its equivalent.'" (Defendant-Waste Management's Appendix 60a).

> The Legislature's inclusion of "loss of industrial use of both legs" in subsection (g) also reflects the Legislature's judgment that only the industrial loss of *both* limbs constitutes a total and permanent disability. The Legislature has made the policy decision that loss of industrial use only rises to the level of a total and permanent disability when *both* legs or both hands or both arms or one leg or one arm have lost their industrial use. MCL 418.361(3)(g).
>
> Accordingly, I do not find that the word "[l]oss" in the phrase "[l]oss of both legs" in MCL 418.361(3)(b) refers to a combination of anatomical loss and industrial loss, which is the result reached by the majority. My construction comports with the object of total and permanent disability provision and the unique harm it is designed to remedy.
>
> * * *
>
> Our Supreme Court found that plaintiff had not demonstrated the loss of industrial use of his left leg because his left leg, when braced, was functional and could support industrial use. *Cain*, *supra* at 524. Therefore, within the total and permanent disability setting, plaintiff has suffered only the anatomical loss of his right and not the industrial loss of his left leg. Consequently, he cannot claim an award of total and permanent disability benefits under MCL 481.361(3)(b) for the "[l]oss of both legs." (Fund's Appendix 6a).

This analysis is entirely correct. Its correctness is illustrated by recognizing: § 361(3)(g)'s "loss of industrial use" category would be legislatively unnecessary in the T&P category if § 361(3)(b)'s loss "at or above the ankle" included non-amputation/loss of industrial use claims. That is: if a claimant can meet § 361(3)(b) – as the Court of Appeals majority asserts – by proving loss of industrial use, why would there be a separate "loss of industrial use" category in § 361(3)(g)?

Finally, the Court of Appeals' majority said:

> Following the SIF's rationale in this case would produce absurd results. For instance, a double amputee would be denied total and permanent disability benefits. ... It would be nonsensical and specious to determine that an individual who suffered the specific loss of each leg would then not also be entitled to total and permanent disability benefits for the loss of both legs. ... We find no logic to the position that an individual who has been determined to have suffered the specific loss of both legs would be ineligible to

> receive total and permanent disability benefits under MCL 418.361(3)(b). To hold otherwise would produce unfair results and would essentially result in a statutory interpretation that exalts form over substance. (Defendant-Waste Management's Appendix 71a-72a).

It is not the Fund's position that a double amputee would be denied T&P benefits. A double amputee *would* be awarded T&P benefits under § 361(3)(b). That is the category designed for double amputees. The Fund's point is instead: where there is no dual amputation, *then* the only appropriate category for T&P is the paralysis category (not present here) or the loss of industrial use of the legs (already rejected here).

D. Summary

T&P benefits for loss of the legs requires either bilateral anatomical loss under § 361(3)(b) or "[p]ermanent and complete paralysis of both legs" under § 361(3)(e) or "loss of industrial use of both legs" under § 361(3)(g). Here, there is undeniably no bilateral anatomical loss. There is undeniably no claim of paralysis. And, plaintiff has already failed with his "loss of industrial use" claim on the previous submission. There is, therefore, no statutorily created T&P category covering plaintiff's condition. This is not exalting "form over substance" as the Court of Appeals says. (Defendant-Waste Management's Appendix 72a). It is instead applying the statute as written and refusing to stretch it to meet a situation it does not cover.

III. WITH RESPECT TO SPECIFIC LOSSES UNDER § 361(2), THERE IS NO STATUTORY "LOSS OF INDUSTRIAL USE" STANDARD FOR DETERMINING SPECIFIC LOSSES. THEREFORE, THE DECISIONS BELOW LEGALLY ERRED BY AWARDING PLAINTIFF SPECIFIC LOSS BENEFITS UNDER A "LOSS OF INDUSTRIAL USE" STANDARD.

A. Standard Of Review

The standard of review with respect to this issue is the same as that for the preceding issue.

B. Summary

Consideration of this entire controversy exemplifies how problems are needlessly created when the statute's text is not observed initially. Legal consequences later mount to make things needlessly complex.

The preceding § 361(3) T&P controversy is an outgrowth of case law refusal to adhere to the § 361(2) specific loss text in resolving the question: does the "loss of industrial use" standard apply to determine specific losses? The Fund is not alone in pinpointing this question as the seed of the present controversy. Plaintiff also recognizes the T&P problem now before the Court is the result of a collision course between § 361(2) and (3) as a result of certain case law. (Plaintiff-Appellee's Brief in Opposition to Application for Leave to Appeal, p 16, found at Fund's Appendix 7a). Plaintiff blames this Court's prior decision in this case for the collision course. *Id.* Plaintiff says this Court's adoption at the last submission of a corrected test for "loss of industrial use" in T&P's § 361(3)(g) category brought that provision into conflict with the specific loss provision because the uncorrected test applies to specific losses via other case law. The Fund too notes the conflict, but believes the blame lies not with the Court's prior decision but instead with an aberrant line of cases that do not follow the statute's text. The Fund maintains no "loss of industrial use" inquiry was ever appropriate in the specific loss section for the simple reason: the phrase "loss of industrial use" does not appear in the specific loss section. The *only* place in the statute where the

phrase "loss of industrial use" appears is in the T&P category of § 361(3)(g). *Pipe v Leese Tool & Die Co*, 410 Mich 510; 302 NW2d 526 (1981) and its aberrant predecessors have caused the problem now before the Court by judicially grafting the "loss of industrial use" phrase from the T&P provision onto the specific loss provision. The Fund asks the Court to overrule *Pipe* and its predecessors.

C. A "Loss Of Industrial Use" Standard Does Not Appear In The Specific Loss Category, Only In The T&P Category

The phrase "loss of industrial use" appears in the T&P provision of the Act and appears nowhere in the "'substantial[ly] differen[t]'" specific loss provision.[12] *Cain*, 465 Mich at 524. The specific loss inquiry is, instead, an inquiry into whether the claimant has lost any of the body members listed by the Legislature. When the Legislature says "loss" in the specific loss section, it means actual loss (amputation) of the member (with one exception not applicable here). That the Legislature contemplates actual anatomical loss – not "loss of industrial use" – follows from examination of the statute's words.

The Legislature says, "An *amputation* between the elbow and wrist that is 6 or more inches below the elbow shall be considered a hand, and an *amputation* above that point shall be considered an arm." MCL 418.361(2)(i) (emphasis added). When speaking of the specific loss of the leg – at issue in this case – the Legislature said, "An *amputation* between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an *amputation* above that point shall be considered a leg." MCL 418.361(2)(k) (emphasis added).

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[12] The phrase "loss of industrial use" had been hatched in case law discussion and analysis of specific loss cases, however. *E.g.*, *Rench v Kalamazoo Stove & Furnace Co*, 286 Mich 314, 320; 282 NW 162 (1938). The Legislature used it to describe T&P in 1956 PA 195. The Legislature has not ever used it for specific losses.

In the one instance where the Legislature in the specific loss provision allows for benefits without actual amputation of a member (an eye), the Legislature specifically said, "Eighty percent loss of vision of 1 eye shall constitute the total loss of that eye." MCL 418.361(2)(*l*). If the Legislature had intended recovery for specific loss of other body members, *e.g.*, a leg, without an amputation, then the Legislature would have similarly provided that loss of a certain percentage of the leg's function suffices. The Legislature did not so provide. Instead, in speaking to legs, the proviso describes only where an "amputation" must be measured to constitute a loss of a leg. Here, plaintiff has no amputation of any portion of his left leg. Therefore, he has no specific loss of his non-amputated left leg. To award specific loss benefits under a "loss of industrial use" test is to apply a phrase and a test the text of the statute does not recognize.

D. Case Law

The Court had originally applied the specific loss provision in accordance with the text. *E.g.*, *Packer v Olds Motor Works*, 195 Mich 497, 499-500; 162 NW 80 (1917); *Adomites v Royal Furniture Co*, 196 Mich 498, 500-501; 162 NW 965 (1917); *Wilcox v Clarage Foundry & Manufacturing Co*, 199 Mich 79, 85-86; 165 NW 925 (1917); *Fanning v W. E. Wood Co*, 255 Mich 618, 619; 238 NW 627 (1931); *Van Eps v Sligh Furniture Co*, 257 Mich 112, 113; 241 NW 182 (1932).

When uncertainty arose with respect to how much of an amputation constituted a specific loss of an arm or leg, the Legislature amended the Act to prescribe the requisite amount of amputation. Specifically, the original Act had not specified where one measures the "loss of a leg" or "arm." 1912 PA 10, Sec 10, § 5440. (Fund's Appendix 10a-11a). Absent a specific guideline, case law began to say such things as "the loss of a substantial portion of the leg was the loss of the leg." *Reno v Holmes*, 238 Mich 572, 575; 214 NW 174 (1927); see also, *Stocin v C. R. Wilson Body*

Co, 205 Mich 1; 171 NW 352 (1919). Or, loss of "'so much of the hand'" so as to render it "practically useless in manual employment" sufficed. *Lovalo v Michigan Stamping Co*, 202 Mich 85, 87, 89; 167 NW 904 (1918).[13] In response to this case law drift and to lend clarity to what it intended to compensate in the specific loss provisions, the Legislature added greater specificity to the statute via 1927 PA 63, enacted April 23, 1927. Underscoring, in effect, the need for amputation, the Legislature specified the level of actual amputation for finding specific loss. The 1927 amendments said:

> For the loss of an arm, sixty-six and two-thirds per centum of average weekly wages during two hundred weeks;
>
> An amputation between the elbow and wrist six or more inches below the elbow shall be considered a hand, above this point an arm;
>
> * * *
>
> For the loss of a leg, sixty-six and two-thirds per centum of average weekly wages during one hundred and seventy-five weeks;
>
> An amputation between the knee and foot six or more inches below the knee shall be considered a foot, above this point a leg; (Fund's Appendix 13a).

Case law continued to be inconsistent, however. Case law strayed at times. *E.g.*, *Shumate v American Stamping Co*, 357 Mich 689, 691; 99 NW2d 374 (1959). The Court at times held more firm to the statute's requirement. For example, in *Hlady v Wolverine Bolt Co*, 325 Mich 23, 26; 37 NW2d 576 (1949) this Court said where four fingers had been amputated but not the hand, "[t]o award plaintiff compensation for loss of a hand under this record would be in total disregard of the controlling statute."

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[13] *Lovalo* did also offer a statutory reason for its holding pertinent only to loss of hands. See n 17 at p 29, *infra*.

The great debate in this Court on the propriety of adhering to the statutorily required amputation for specific losses occurred in *Palazzolo v Bradley*, 355 Mich 284; 94 NW2d 203 (1959). In that 5-3 decision, the first opinion is that of the dissenters who framed the issue in that loss of thumb case as: "Does 'loss of the first phalange of the thumb,' as provided in the statute, mean physical loss or does loss of industrial use meet the test?" *Id.* at 285 (dissenting opinion). The dissent, *Id.* at 287-288, said "actual physical loss and not mere loss of industrial use" is required by statute. The dissent rejected plaintiff's reliance upon a line of cases that held a "loss of industrial use" or a "substantial loss test" sufficient, saying:

> With respect to *Stocin* and *Reno*, the arm or leg cases, ... it is to be noted that after decisions therein the legislature stepped in to clarify the situation by amending the statute to specify the exact location, in terms of inches below the elbow or knee, demarking the point of difference between loss of hand or arm and between loss of foot or leg,* thus forcing the tests of substantial loss or loss of industrial use out of the picture with respect to the loss of those particular members. This tends to accentuate the legislative intent that actual physical loss, as distinguished from loss of industrial use, is the test which the legislature intended to be applied in specific loss cases, except in the 1 instance where the question is whether compensation is to be for loss of fingers and thumb or for loss of hand, in which, as above noted, the proviso clause permits of application of a test other than that of actual physical loss. (Statute also makes express provision for a different test for loss of an eye.*)
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> ---
>
> * Added by PA 1927, No 63, p 80.–REPORTER.
> * Added by PA 1943, No 245, p 431.–REPORTER. *Palazzolo*, 355 Mich at 287-288 (dissenting opinion).

The *Palazzolo* majority said in response:

> There is no question that the Chief Justice [Dethmers, author of the dissenting opinion] has reached a correct result under existing Michigan law. The big question is whether the decisions creating

> this law are sound or whether this line of cases should be overruled. *Palazzolo*, 355 Mich at 289, bracketed words added.[14]

The *Palazzolo* majority then proceeded to "restate the reasons why we feel we should not in this case be governed by the above cited precedents," *i.e.*, the decisions requiring amputation. *Palazzolo*, 355 Mich at 289. Beginning with "dice-loading" approaches reminiscent of the Court of Appeals' majority in the instant case, the *Palazzolo* majority said "a liberal interpretation of the workmen's compensation law should prevail" and invoked "lengthy and scholarly remarks ... made by Justice SMITH ...; Justice BLACK and SMITH ...; and Justice VOELKER ..." in more contemporary workers' compensation decisions. *Id.* The *Palazzolo* majority said it would adopt this "more realistic interpretation of the Michigan statute" and "overrule the decisions of this Court in conflict with [its] position." *Id.* at 289 and 291, respectively. The Court opted for a loss of industrial use standard to determine specific loss. *Id.* at 291. In so doing, the *Palazzolo* majority said "Michigan was once on the right track in regard to this subject" but had abandoned it. *Id.* at 290.

Palazzolo is remarkable. The Legislature did not approve of the case law drift, stepped in to specify "amputation", and corrected case law drift. (Fund's Appendix 12a-13a). Yet, the *Palazzolo* majority acted as if the Legislature had not intervened at all and the only question posed was: which of two competing lines of case law is preferable?

Palazzolo did not end the controversy, however. While this Court in time even dropped a requirement that the legs even sustain direct injury (let alone be amputated),[15] the Court of Appeals

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[14] This is puzzling because the dissent rested its decision not so much on case law but on the Legislature's "stepp[ing] in to clarify the situation" via an amendment *because of* case law drift. *Palazzolo*, 355 Mich at 287-288 (dissenting opinion).

[15] *Paulson*, 371 Mich at 319; *Burke v Ontonagon Road Commission*, 391 Mich 106; 214 NW2d 797 (1974); see also, *Lockwood Continental Motors Corp*, 27 Mich App 597; 183 NW2d 807 (1970).

occasionally applied the law otherwise. *E.g.*, *Mitchell v Metal-Assemblies, Inc*, 3 Mich App 143; 141 NW2d 710 (1966) and *Pipe v Leese Tool & Die Co*, 90 Mich App 741; 282 NW2d 642 (1979). The *Mitchell* Court of Appeals said that "[w]hile it might seem harsh .... To change the law is the province of the legislature, not of this Court." *Mitchell*, 3 Mich App at 150. Similarly, the Court of Appeals in *Pipe* denied specific loss of a hand saying the loss was not the equivalent of "the hand actually be[ing] amputated." *Pipe*, 90 Mich App at 746.

This Court reversed the Court of Appeals in both *Mitchell* and in *Pipe*. In *Mitchell*, this Court disavowed *Hlady*, *supra*, saying the Court now opted for the "more flexible, and manifestly more desirable, rule" that allowed recovery for "loss of industrial use of the hand."[16] *Mitchell*, 379 Mich 368, 378; 151 NW2d 818 (1967). This Court also reversed the Court of Appeals in *Pipe*. Again disapproving of the Court of Appeals' reliance on *Hlady*'s "rather mechanical standard," the Court said *Mitchell* had "specifically and emphatically overruled" *Hlady*. *Pipe*, 410 Mich at 521-522.

Pipe goes beyond even the "loss of industrial use" to further redefine the specific loss statute as follows:

> The standard which evolved from *Lovalo* and *West* and was recently re-invoked and clearly enunciated in *Mitchell* provides both a realistic and practical test for determining eligibility for specific-loss benefits. This standard is: *For purposes of determining an award of specific-loss benefits for the loss of a hand, there must be a showing of either anatomical loss or loss of the industrial use of the hand as determined by the loss of the primary service of the hand in industry.* *Pipe*, 410 Mich at 527 (emphasis in original).

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[16] *Mitchell*, also a hand case, inexplicably added, "Of course, if the statute specifically provides otherwise, then the loss-of-use rule does not apply." *Mitchell*, 379 Mich at 376 n 4. The statute does provide otherwise. *Mitchell*'s mistake is: the question is not whether the statute explicitly forbids recovery, but whether the claimant's condition meets a statutorily created basis for recovery. Compare, *Cain*, 465 Mich at 519; *Kidd*, 414 Mich at 583-584.

The concurrence in *Pipe*, having apparently succumbed to a loss of industrial use standard for specific losses by that time, objected to further expansion of that standard as the "loss of the primary service" standard articulated by the majority. *Pipe*, 410 Mich at 529 (concurring opinion).

E. Resolution

The Fund submits that an understanding of the statute and this case law history should lead the Court to now place the law back on the "right track" *created by the statute.* The Court should overrule *Pipe* and its predecessor line of cases.[17] The statute requires anatomical loss, so much so

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[17] If the Court does not overrule that line of cases culminating in *Pipe*, the Court should at least limit the reach of those cases in two ways.

First, per *Lovalo*, 202 Mich 85; 167 NW 904 (1918) the reason why actual anatomical loss was not required in that hand case was – under reasoning the Fund does not entirely follow – the italicized sentence below evinces legislative intent for a non-anatomical loss *of the hand*:

> Fourth finger, 16 weeks.
>
> The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of ½ of that thumb or finger, and compensation shall be ½ of the amount above specified.
>
> The loss of more than 1 phalange shall be considered as the loss of the entire finger or thumb. *The amount received for more than 1 finger shall not exceed the amount provided in this schedule for the loss of a hand.* Presently, MCL 418.361(2)(e) (emphasis added). *Lovalo*, 202 Mich at 89-90.

The italicized portion is *not* repeated in the parallel provision which relates to the lower extremities in the specific loss category:

> A toe other than the great toe, 11 weeks.
>
> The loss of the first phalange of any toe shall be considered to be equal to the loss of ½ of that toe, and compensation shall be ½ of the amount above specified.
>
> The loss of more than 1 phalange shall be considered as the loss of the entire toe. Presently, MCL 418.361(2)(g).

And, the italicized language is not repeated when discussing loss of a leg or arm. Presently, MCL 418.361(2)(k) and (i), respectively.

Therefore, even if the italicized sentence in the quotation above justified interjection of an industrial loss of use inquiry with respect to the hand, as *Lovalo* insists, the lack of a parallel provision with respect to lower extremities means: no similar loss of industrial use inquiry exists there.

Finally, if *Pipe* is to survive in any form, the Court should not endorse its recasting of the loss of industrial use standard to the "primary service" standard as explained in the *Pipe* concurrence.

that the Legislature specified the level of amputation for specific losses in the statute and such specification remains there today. MCL 418.361(2)(i) and (k).

No small consideration in this request are the problems created across statutory provisions because of abandonment of the specific loss text. Because the Court had read into the specific loss provision a "loss of industrial use" inquiry that textually appears only in the T&P provision, specific loss awards – designed for amputees – followed in non-amputation cases so long as the member was deemed industrially useless. Because specific losses carry with them an uncorrected test,[18] the specific loss provision has been drawn into conflict with T&P's loss of industrial use because the latter carries with it a corrected test. The result – recognized by plaintiff as well – is an irreconcilable state of the law where the loss of industrial use standard is determined without corrective aids for § 361(2) purposes but loss of industrial use *for the same leg* is determined with corrective aids for § 361(3) purposes. That is the result here under the most recent decisions below. This Court should rectify this incongruity for purposes of not only this case but for establishment of a coherent fabric of law.

[18] Note how an uncorrected test makes perfect sense for amputations. A person seeking recovery for a limb actually amputated is entitled to benefits irrespective of whether he or she has a prosthetic device replacing the limb.

RELIEF

WHEREFORE, defendant-appellant, Second Injury Fund (Total and Permanent Disability Provisions), respectfully requests that the Supreme Court reverse the Court of Appeals and Worker's Compensation Appellate Commission and hold that plaintiff is not entitled to total and permanent disability benefits. The Fund further requests that the Court reverse the specific loss award with respect to plaintiff's left leg, and overrule *Pipe v Leese Tool & Die Co*, 410 Mich 510; 302 NW2d 526 (1981).

Respectfully submitted,

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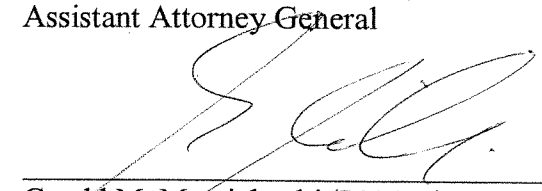

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